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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 03 2011

IN RE: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date. The director also concluded that the petitioner had failed to establish that the beneficiary's academic credentials would qualify him as an advanced degree professional and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner has had the continuing ability to pay the proffered wage and has established that the beneficiary's educational credentials qualify him as an advanced degree professional.[2]

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

For the reasons stated below, the AAO concurs with the director's denial of the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage and that the beneficiary qualified as an advanced degree professional.

The petitioner seeks to sponsor the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2) provides that "an advanced degree means any degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

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[1] After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[2] The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

> Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on March 29, 2005, which establishes the priority date.[3] The proffered wage is stated as $84,000 per year.

Part B of the ETA 750, signed by the beneficiary on March 16, 2005, does not indicate that the petitioner employed him as of the date of signing. The petitioner did submit a 2006 W-2 statement for the beneficiary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on May 17, 2007, the petitioner claims that it was established in 1999, has a gross annual income of over five (5) million dollars and net annual income that is "enough to pay alien's salary." It also claims that it has sixty (60) employees.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

At the outset, it is noted that the director issued a request for evidence on November 15, 2007, directing the petitioner to provide proof of its ability to pay the proffered wage of $84,000 per year

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[3] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

and requesting additional documentation of the beneficiary's academic credentials. With reference to the petitioner's ability to pay, the director acknowledged receipt of some financial documents and requested copies of the petitioner's 2006 federal tax return and copies of the beneficiary's W-2 or Form 1099 for any year that the petitioner has employed the beneficiary. He observed that the petitioner had filed multiple petitions and that several of them contained 2005 federal tax returns that featured different figures from other tax returns filed for the same years. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the director requested that the petitioner obtain the Internal Revenue Service (IRS) transcripts for the 2005 and 2006 federal tax returns.

The director also noted that as the petitioner had filed multiple I-140 petitions, it is incumbent upon the petitioner to establish its ability to pay the total amount of the proffered wage(s) for all beneficiaries. The director requested a list of the pertinent receipt numbers of petitions filed, name and date of birth of the beneficiary, permanent job offered and the proffered wage. The director additionally noted that if the petitioner is unable to demonstrate the ability to pay the respective proffered wage for all beneficiaries, it must identify which petition or petitions that would be supported by its ability to pay.

In reviewing a petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage for that period. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period.

In determining the petitioner's continuing financial ability to pay the proffered wage, USCIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross sales and profits exceeded the proffered

wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation as claimed by counsel, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The financial documentation submitted to the record by the petitioner included copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2005,[4] 2006, and 2007. Additionally, it

[4] Similarly, as noted by the director, the two 2005 tax returns contain discrepant figures. The 2005 tax transcript in the record contains only the petitioner's net income, and not other figures such as gross receipts to confirm the tax return's validity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582,

submitted copies of its 2008 and 2009 tax returns in response to the AAO's notice of derogatory information. The 2007 return, prepared according to the cash accounting method was provided on appeal. On appeal, the petitioner also provided additional copies of its federal corporate tax returns for 2005, 2006, and 2007. These three returns (2005, 2006, and 2007) are not the returns filed with the IRS, but the petitioner submitted them to illustrate the difference in figures if the accrual method of accounting were used to prepare them so as to better support the petitioner's assertion of its continuing financial ability to pay the proffered wage. The petitioner's tax returns that were actually filed with the IRS were prepared pursuant to the cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to the accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

However, this office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seek to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose in presenting tax returns prepared based on a different method. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to an accountant's adjustments. That said, the information provided on the returns submitted to the IRS indicates the petitioner's fiscal year is a standard calendar year. The returns contain the following:

	2005	2006	2007	2008	2009
Net Income[5]	$102,697	$128,753	$401,454	$292,306	$ 43,640

591 (BIA 1988).

[5] The petitioner filed as an S Corporation in the remaining years. Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005), and line 18 (2006) and (2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on Schedule K for 2005, 2006 and 2007, the petitioner's net income is found

Current Assets	$ 74,780	$ 86,602	$260,385	$167,043	$142,293
Current Liabilities	$220,150	$377,686	$304,962	$179,391	$129,882
Net Current Assets	-$145,370	-$291,084	-$ 44,577	-$ 12,348	$ 12,411

As illustrated in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also submitted a copy of the beneficiary's W-2 issued to him by the petitioner in 2006. The following information is indicated:

Year	Amount of Wages		Difference from Proffered Wage of $84,000
2005	-0-		$84,000 Less
2006	$29,531.75		$54,468.25 Less
2007	$53,103.50	(provided on appeal)	$30,896.50 Less

The record does not contain any of the beneficiary's W-2(s) for 2008 or 2009, although in response to the notice of derogatory information, the petitioner provided copies of the state unemployment insurance forms indicating that the petitioner paid gross wages of $12,597 to the beneficiary in the fourth quarter of 2009 and gross wages of $14,312.50 in the first quarter of 2010.

The director denied the petition on May 1, 2008. He noted that in response to the director's request for evidence, the petitioner had submitted federal tax returns, W-2s for the instant beneficiary and other beneficiaries, an incomplete list of other I-140 petitions filed by the petitioner, bank statements, evidence of assets in India and a request that the petitioner's line of credit be considered in the determination of the petitioner's ability to pay the proffered wage.

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line 17e and 18 on Schedule K of its 2005, 2006 and 2007, 2008 and 2009 tax returns.

[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The director declined to consider the petitioner's bank statements, line of credit and holdings in India as determinative of the petitioner's ability to pay the proffered wage.

The director noted that although it appears that the petitioner would have the necessary additional funds to cover the difference between the instant beneficiary's full proffered wage and the wages actually paid, the petitioner could not establish its ability to pay for all of its sponsored workers. With respect to the evidence of other sponsored beneficiaries that the petitioner identified, the director found that the nine beneficiaries as accounted for by the petitioner, would require $660,000 in wages in 2005 and $754,000 for wages in 2006. The same nine were paid wages of $182,392.11 in 2005 and $373,792.48 in 2006. Therefore, the director found that additional funds of $477,607.89 in 2005 and $380,207.52 in 2006 would be needed to pay these nine beneficiaries their respective salaries at a level equal to each of their proffered salaries. The evidence does not establish the petitioner's ability to pay these total proffered wages owed for 2005 or 2006 and therefore does not establish the ability to pay the instant beneficiary's proffered wage.

The director continued to determine that the list of all I-140 petitions filed had not been provided by the petitioner, which claimed only nineteen pending petitions and submitted a list of an additional eight petitions that it desired to withdraw. The director noted that even accounting for the requested withdrawals, a complete list of all petitions and sponsored beneficiaries would have included at least 58 I-140 petitions. As the petitioner must establish that every job offer is realistic and must demonstrate the ability to pay each respective proffered wage until each beneficiary has obtained lawful permanent residence, then without a complete accounting, the petitioner's ability to pay the proffered wage has not been established.

The AAO would further note that the petitioner has filed additional nonimmigrant and immigrant petitions subsequent to the priority date of the instant petition. USCIS electronic records indicate that as of September 3, 2010, the petitioner, [redacted] has filed 546 nonimmigrant and immigrant petitions in the past six years.[7] Of these, over 450 have been non-immigrant petitions and approximately 100 immigrant petitions. The petitioner claims a workforce of 60 employees. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Thus, even while considering covering the nine sponsored beneficiaries proposed by the petitioner, as noted by the director, after attempting to cover the total proffered wages out of the petitioner's net income or net current assets for these years, the petitioner would have negative net income and negative net current assets remaining to pay the other sponsored workers.

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[7] The electronic records also indicate that "Tekstrom" filed 82 nonimmigrant and immigrant petitions between 2001 and 2003.

Further, as noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. This obligation applies not only pending petitions, but petitions that had been approved where permanent residence has not yet been achieved. Given the significant numbers petitioned for by this employer, without information relevant to each sponsored beneficiary, it is not possible to calculate the petitioner's total wage obligation or demonstrate its continuing ability to pay the respective proffered wages. This information has not been provided. The record indicates that the beneficiary was not employed by the petitioner in 2005. Therefore the petitioner's ability to pay the certified salary to this beneficiary has not been established by full payment of the proffered wage. Similarly, in 2006, he was paid $54,468.25 less than the proffered wage of $84,000 per year and in 2007, the beneficiary was paid $30,896.50 less than the proffered salary. Without specific information provided as to the other beneficiaries that the petitioner has sponsored, a positive determination of the petitioner's ability to pay may not be made as to whether enough funds were available to cover the full proffered wage for this beneficiary in any of these years. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is noted that counsel asserts that the petitioner's payments to subcontractors in the amounts of $1,261,426 in 2005, $978,476 in 2006 and $1,078,967 in 2007 must be considered in the petitioner's ability to pay the proffered wage in this proceeding because had the beneficiaries of multiple I-140 petitions been employed, the funds covering the employment of subcontractors could have been expended to cover beneficiaries' salaries and not used to pay subcontractors. The AAO is not persuaded by this hypothesis. Undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is unclear exactly which sponsored beneficiaries to whom counsel is referring. Further, many of these beneficiaries may have already been employed by the petitioner in a non-immigrant status, and thus, would not replace subcontractors. As noted by the director, a complete accounting of the sponsored I-140 beneficiaries and the petitioner's total wage obligation has not been made. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Additionally, the record does not identify any of the subcontractors to whom counsel is referring. The evidence does not state their wages, verify their full-time employment, duties, or provide evidence that the petitioner has replaced or will replace them with other sponsored beneficiaries. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel asserts that the petitioner's line(s) of credit at two banks must be considered in support of its ability to pay the proffered wage. A letter from [redacted], dated December 18, 2007, indicates that the petitioner established a $200,000 line of credit on December 22, 2004. The available balance as of the date of the letter is $70,118.00. Another undated letter from the WSFS Bank indicates that a $150,000 line of credit was established on September 7, 2004. The

current balance is $75,509.71. Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 730 F. Supp. 441 (D.D.C. 1988), *rev'd in part on other grounds*, 927 F.2d 628 (D.C. Cir. 1991) in support of his assertion that a petitioner may rely on a line of credit similar to a pledge of support from a larger church to a local church. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit will not be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying a certified salary.[8]

Further, counsel's reliance on *Full Gospel Portland Church v. Thornburgh* is misplaced. The case in *Full Gospel Portland Church v. Thornburgh* involved the consideration of whether an alien was a "professional" within the meaning of 8 U.S.C. § 1101(a)(32). With reference to the ability to pay the proffered salary, the court noted that a parish church may rely upon the financial support of the parent nation-wide church. In this matter, although the AAO may consider the guidance suggested in that case, it is noted that the rationale of *Full Gospel* is not binding in this regard. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Moreover, the same district court, in a case involving the determination of whether an alien could be classified as a special immigrant religious worker, more recently found, that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage. *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997). In this matter, a line of credit does not represent an unrestricted pledge from a parent church, but merely the petitioner's own line of credit with a corresponding debt and liability.

[8] Additionally, even if considered as a source of funds, which we do not accept, the amounts would be insufficient for the petitioner to establish its ability to pay for all of its workers.

With respect to the petitioner's bank statements submitted to support its ability to pay the proffered wage in during the relevant period, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements show the amount in an account on a given date, and do not generally show a sustainable ability to pay a proffered wage because they do not reflect the petitioner's encumbrances that may affect its financial profile. Further, in this matter, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not listed on the corresponding tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was already considered in determining the petitioner's net current assets.

Counsel renews the argument on appeal that the petitioner's Indian assets should be considered in its ability to pay the proffered wage to the beneficiary. This property purportedly consists of a 70% stock ownership in a company in India called "Qualitree Solutions Private Limited" (Qualitree). The documentation submitted indicates that Qualitree is a corporation. According to a letter, dated December 26, 2007, submitted on appeal, the value of the petitioner's investment is $763,401. However, as noted by the director, there is no evidence in the record that establishes that the stock held in a separate foreign corporation could be easily liquidated making it readily available to pay wages in the U.S. or other current obligations. As noted by the director, corporations are distinct legal entities from its owners and shareholders, and the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel asserts that the petitioner established its ability to pay in 2005 because the proffered wage must be prorated as of the priority date of March 29, 2005 through December 2005. Counsel divides that proffered wage by 12 (months) and calculates that the petitioner was obliged to have the ability to pay $7,000 per month or $70,000 (10 months) of the annual proffered wage. With regard to a prorated calculation of the corporate petitioner's ability to pay the proffered wage in 2005, it is noted that in general, USCIS will not consider 12 months of income, as shown for example on the federal income tax return, towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains specific evidence of net income or, for example payment of the beneficiary's wages specifically covering that portion of the year that occurred after the priority date (and only that period), that is not the case here. Here, the evidence is the 2005 federal income tax return which

is based on annual figures, and not on a prorated calculation. Nothing demonstrates that the petitioner employed the beneficiary in 2005 to show wages paid from March 2005 onward.

It is noted that in response to the AAO's notice of derogatory information related to the state corporate status of the petitioner, it provided copies of its 2008 and 2009 federal income tax returns. Although the copies of the returns appear to be prepared based on the cash method of accounting, it is not clear that these are the actual returns filed with the IRS.[9] Therefore, the petitioner's ability to pay the full proffered wage in these years cannot be determined.

It is noted that in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), as cited by counsel, is a case in which the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the [redacted]etitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As noted above, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Additionally, as noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. This would cover not only pending petitions, but where petitions that have been approved and permanent residence has not yet been obtained as of each respective priority date. Given the high numbers of petitions

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[9]The petitioner has also submitted copies of its state unemployment reports for the last quarter of 2009 and the first quarter of 2010. They indicate that the beneficiary remains employed with the petitioner and was paid gross wages of $12,597 in the last quarter of 2009 and $14,312.50 in the first quarter of 2010. These wage records do not include 2008. As there is no clear evidence of the petitioner's payment of the full proffered wage to the beneficiary and the tax returns for 2008 and 2009 are not confirmed to be the ones actually filed with the IRS, we cannot conclude that the ability to pay the proffered wage has been established during these years.

filed, and the lack of information from which to calculate whether the same set of financials can accommodate all sponsored beneficiaries, it may not be concluded that this petitioner has demonstrated that ability. In the present case, although the petitioner has shown an increase in gross receipts from 2005 to 2007, respectively, it must be viewed in the context of the hundreds of non-immigrant and immigrant petitions that it has filed and the petitioner's total concurrent total wage obligation. Further, the petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonegawa* are applicable.

Additionally, it is noted that in a decision dated February 5, 2007, the Supreme Court of Delaware affirmed a Superior Court decision awarding damages to a former employee of the corporate petitioner for a variety of wrongful employment practices including a claim for unpaid wages and intentional infliction of emotional distress. *See Tekstrom, Inc. and Charan Minhas v. Sameer K. Savla,* 918 A.2d 1171, 2007 WL 328836 (Del. Supr.) Looking at the record, as well as the petitioner's sponsorship of other multiple beneficiaries during this period and corresponding burden to demonstrate the continuing ability to pay the proffered wage for all sponsored aliens as of each respective priority date, we do not conclude that this case is analogous to the circumstances set forth in *Sonegawa* or that the petition merits approval on this basis.

As noted above, the director denied the petition because the beneficiary's educational credentials failed to establish that the beneficiary qualified as an advanced degree professional. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	x
High school	x
College	x
College Degree Required	Master's or equiv. ***
Major Field of Study	Comp. Sci., CIS, MIS, Engg., Arts.

Experience:

Job Offered	2 [yrs]
(or)	

Related Occupation	2 [yrs]	Programmer, Programmer Analyst,**

Block 15:

Other Special Requirements	40% travel to client sites ***Will also accept Bachelor's or Equiv. in Comp. Sci., CIS, MIS, Engg., Arts plus five (5) years progressive experience in lieu of Master's plus two (2) years of experience. **or any experience providing skills in described duties.[10]

In support of the beneficiary's educational qualifications, the petitioner submitted copies of the beneficiary's three-year 1997 Bachelor of Arts degree from [redacted] His transcripts indicate that he took courses in history, political science and public administration. The petitioner also submitted a copy of a June 1998 Post-Graduate Diploma Course in Computer Applications from [redacted]

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001). A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision

[10] The described duties include design and implementation of technology solutions including software design, systems architecture, testing and integration of systems operations for financial/banking and other commercial business applications. Application of knowledge of C, C++, GUI, VB, VC++, HTML, QA, WinRunner, LoadRunner, Linux.

involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that

> bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[11] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a *single* degree that is the "foreign equivalent degree" to a United States baccalaureate degree. (Emphasis added). 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

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[11] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

In this case, the beneficiary has a three-year bachelor's degree and a post-graduate diploma. The current record does not establish that he possesses a single four-year bachelor's degree from a college or university.

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The petitioner submitted two credentials evaluations. The initial evaluation, dated April 6, 2001, is from the [redacted]., and is signed by [redacted] This evaluation simply states that the combination of the beneficiary's three-year bachelor's degree from Panjab University and the one-year course at Punjabi University equates to the U.S. equivalent of a Bachelor of Science in Computer Applications.[12]

The petitioner has also provided a credentials evaluation from the Education Evaluation and Immigration Services (E.E.I.S.), dated December 16, 2007, signed by [redacted] The evaluation offers alternative determinations. Initially, the beneficiary's three-year bachelor's degree is determined to be, standing alone, as equivalent to a four-year U.S. bachelor's degree. The E.E.I.S. evaluation claims that the bachelor of arts programs in India are very intense in terms of lecture hours, therefore the student completes more than 120 credit hours needed for the U.S. equivalent of a bachelor's degree. Using the Carnegie unit of equivalence, the evaluation states that each course equals 10 credit hours every two semesters. As an alternative determination, the E.E.I.S. determines that in conjunction with the beneficiary's post-graduate diploma in computer applications from the Punjab University, the beneficiary has the U.S. equivalent of a four-year bachelor's degree in computer information systems. The basis for the alternative conclusion is that the beneficiary's B.A. degree is the equivalent to three years of undergraduate coursework in the U.S., and in conjunction with the beneficiary's post-graduate diploma from Punjabi University, it is determined to be the equivalent of four years of coursework, equivalent to a U.S. bachelor's degree in computer information systems.

It is noted that USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As stated by the E.E.I.S.

[12] Computer Applications is not listed on Form ETA 750 as an allowed field of study.

evaluation, while some U.S. schools appear to accept a three-year baccalaureate for graduate admission, it can be presumed that if an Indian three-year degree were truly equivalent to a U.S. four-year baccalaureate, all U.S. universities would unconditionally accept three-year degrees for admission to graduate programs without provision. The E.E.I.S. evaluation also refers to accelerated programs in the United States that permit a bachelor's degree to be completed in three years, not four, thus showing that a U.S. bachelor's program does not necessarily demand a four-year program. The AAO notes that programs that allow students to work at an accelerated pace do not establish that a typical three-year Indian degree is equivalent to a four-year baccalaureate U.S. degree or even an accelerated U.S. program.

It is further noted that the E.E.I.S. evaluation claims that the beneficiary's three-year bachelor of arts degree represents the U.S. equivalent of a four-year bachelor's degree, equating to 120 credit hours required for graduation, because an Indian three-year degree requires at least the same number of classroom hours as a U.S. bachelor's degree. The E.E.I.S. bases this equivalency formula on the claim that the U.S. semester credit hour is a variant of the [redacted]." The [redacted] was adopted by the [redacted] in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject. For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.[13] This unit system was adopted at a time when high schools lacked uniformity in the courses they taught and the number of hours students spent in class.[14] According to its website, the [redacted]" relates to the number of classroom hours a high school student should have with a teacher, and "does not apply to higher education."[15] Here, the beneficiary's transcript does not provide any information as to classroom hours or credits, but simply lists the courses and numerical marks obtained.

There is no support in the record for the argument that a three-year bachelor's degree from India is equivalent to a U.S. bachelor's degree because both degrees allegedly require an equivalent amount of classroom time. The evaluations fail to provide any peer-reviewed material (or other reliable evidence) confirming that assigning credits based on hours spent in the classroom at the time that the beneficiary attended the university is applicable to evaluating three-year bachelor of arts degrees from India. For example, if the ratio of hours spent studying outside the classroom is different in the Indian and U.S. systems, comparing hours spent in the classroom would be misleading.[16]

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[13] http://www.carnegiefoundation.org/about/sub.asp?key=17&subkey=1874&topkey=17&printable=... (accessed January 24, 2011).

[14] *Id.*

[15] *Id.*

[16] *See e.g.*, [redacted] The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," at http://handouts.aacrao.org/am07/finished/F0345p_M_Donahue.pdf (accessed January 24, 2011)(stating that the Indian system is exam-based instead of credit-based, thus transfer credits

In determining whether the beneficiary possessed a bachelor's degree or a foreign equivalent degree, we have reviewed the [redacted] created by the [redacted] according to its [redacted], is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/ register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

In the "credential advice," section relevant to a baccalaureate degree from India, EDGE indicates that a "Bachelor of Arts/ Bachelor of Commerce/Bachelor of Science represents attainment of a level of education comparable to two to three years of university study in the United States. Credit may be awarded on a course by course basis."

EDGE discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provide:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

There is no evidence in the record that the beneficiary's three-year bachelor of arts degree was the required predicate degree for the conferment of his post-graduate diploma. Neither evaluation addresses this issue. The beneficiary's three-year Bachelor of Arts alone is not equivalent to the required four-year U.S. bachelor's degree or its foreign equivalent. The evidence in the record is insufficient to demonstrate that the beneficiary's one-year post-graduate diploma is based on the completion of a three-year bachelor's degree for entry. Thus, we cannot conclude that the

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from India are derived from the number of exams passed; and that, in India, six exams equates to 30 credit hours).

beneficiary has the foreign equivalent of a U.S. bachelor's degree as required by the labor certification. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" from a college or university, the beneficiary does not qualify as an advanced degree professional under this visa classification pursuant to section 203(b)(2) of the Act. For this reason, in addition to the petitioner's failure to establish its continuing ability to pay the proffered wage, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 at 145 (AAO's *de novo* authority well recognized by federal courts).

Additionally the petition may not be approved pursuant to a September 23, 2010, [redacted]), listing the petitioner, [redacted]' as subject to debarment. Pursuant to the [redacted], petitions filed by the petitioner may not be approved for a period of one year, commencing on July 31, 2010 and ending on July 31, 2011.

The petitioner in this case, [redacted], under its former name of [redacted] Inc., was the subject of an investigation by the DOL in accordance with alleged violations of the INA and corresponding H-1B provisions of the Act. As result, on March 25, 2009, the U.S. District Court in Delaware entered an order granting the government's motion for summary judgment against [redacted]. *See* [redacted]. The court noted that since "1999, [redacted] has petitioned for and hired approximately 600 nonimmigrant workers with H-1B visas." *Id.* On appeal, the Third Circuit affirmed the Secretary of the Department of Homeland Security's authorization to impose the debarment sanction. [redacted] Therefore, as [redacted] was operating as and through [redacted] and the September 23, 2010 Neufeld Memorandum references "doing business as [redacted]' the debarment sanction applies to [redacted] as a named entity in the debarment memorandum. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B non-immigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f)."[18]

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[17] In a letter, dated December 22, 2006, as referenced in another file, [redacted], the petitioner acknowledged that it was known as [redacted]

[18] We note that certain statutes that preclude USCIS from approving applications effectively

USCIS may not approve a nonimmigrant or immigrant petition during the debarment period, regardless of when it was filed. Accordingly, the instant petition must be denied as the petition became ready for adjudication during the period of debarment.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or misrepresentation of a material fact on a labor condition application, and would result in fines of not more than $1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than $5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed $35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.